

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF LABOR AND INDUSTRY

In the Matter of Mavco Inc.,
Residential Building Contractor
License No. 5572

FINDINGS OF FACT,
CONCLUSIONS, AND
RECOMMENDATION

The above-matter came on for a hearing before Administrative Law Judge Kathleen D. Sheehy on December 6, 2005 at 9:30 a.m. at the Office of Administrative Hearings, 100 Washington Square, Suite 1700, Minneapolis, Minnesota. The hearing record closed on December 19, 2005, upon receipt of the Respondent's post-hearing submission.

Michael J. Tostengard, Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, MN 55101-2130, appeared for the Department of Labor and Industry (the Department).¹

Brian Reitzner, President, Mavco, Inc., 11227 River Road NE, Hanover, MN 55341 (Mavco or Respondent), appeared without counsel.

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Labor and Industry will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommended Decision. Under Minn. Stat. § 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Nancy Leppink, Deputy Commissioner, Minnesota Department of Labor and Industry, 443 Lafayette Road North, St. Paul, MN 55155 to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. In order to comply with this statute, the Commissioner must then return the

¹ This action was commenced by the Department of Commerce. On May 16, 2005, the Governor signed Executive Order 193, transferring the responsibility for regulation of residential building contractors to the Department of Labor and Industry.

record to the Administrative Law Judge within 10 working days to allow the Judge to determine the discipline to be imposed. The record closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

STATEMENT OF ISSUE

1. Did Respondent fail to provide a complete response to the Department's request for information, in violation of Minn. Stat. § 45.027, subd. 7(3)?

2. Did Respondent fail to prepare a written contract and written change orders for a customer, in violation of Minn. R. 2891.0030?

The Administrative Law Judge concludes the Respondent did not violate Minn. Stat. § 45.027, subd. 7(3), or Minn. R. 2891.0030.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mavco, Inc., is a residential remodeling contractor that specializes in restoring homes that have sustained fire, wind, or water damage. It has about 20 employees and is located in Hanover, Minnesota.²

2. Rod and Karla Eggink own a home in Becker, Minnesota. On May 8, 2003, their home was severely damaged by fire. They contracted with the Respondent to repair the damage.³

3. The signed contract, which is Mavco's standard form, is dated May 14, 2003. The parties are Mavco and the Egginks. It provides in relevant part as follows:

I, the owner, who has signed below, authorize Mavco, Inc. DBA Maverick Construction; Contractor's License #5572, to proceed with repairs to my property at the address below. *The repairs are defined by the estimate submitted, to, and approved by, my insurance carriers, its agent or by me.* I understand what the estimate includes.

² Testimony of Brian Reitzner.

³ Ex. 1.

I understand that payment is due upon completion of the repairs. If I have received a partial insurance payment, this payment is due to Maverick Construction as a progress payment once the repair has been substantially started. I agree to use the proceeds from the check/s to pay for the cost of repairs. I acknowledge I will be responsible to pay for my deductible and for any changes or additions to the approved estimate, or amounts, which exceed my insurance coverage.

Maverick Construction has notified me that this agreement is subject to state and federal laws that require notice that I have three business days to rescind this agreement. For this reason I acknowledge that work will not be started before _____ the actual start day may be later due to scheduling of employees, subcontractors and materials.⁴

4. The Respondent prepared a 50-page estimate for the Egginks' insurer, Farmers Insurance Co., using a software program relied upon by insurers called Xactimate. The estimate describes in detail the work to be done in each room of the home for a total price of \$269,887.81. The estimate was provided to Farmers Insurance Co. on or about May 15, 2003.⁵

5. The insurance company assigned the claim to an adjuster located in Mobile, Alabama.⁶

6. The Respondent could not begin construction activity for approximately six weeks because of a cause and origin investigation by the local fire department.⁷

7. According to the Respondent's records, plumbing, insulation, cabinetry, and a variety of miscellaneous work was performed beginning on or about May 20, 2003, through July 2, 2003. After about a two-week hiatus, work started again on July 15, 2003.⁸

8. On July 21, 2003, the insurance company issued a check in the amount of \$167,514.63 as a partial payment of the claim for the building. The check was made payable to the Egginks and their mortgage holder.⁹

9. On July 28, 2003, the Egginks paid the Respondent \$23,100.¹⁰

10. On or about August 18, 2003, the insurance adjuster sent to Respondent the insurance company's estimate of what would be required to repair the home. The insurance company's estimate totaled \$206,419.23.¹¹

⁴ Ex. 5, page 7 (emphasis added).

⁵ Ex. 62.

⁶ *Id.*

⁷ Ex. 3, page 1.

⁸ Ex. 57 (transaction report).

⁹ Ex. 68.

¹⁰ Ex. 1, page 7.

11. On September 8, 2003, the Respondent sent back to the adjuster a line-by-line comparison of what it thought was required to return the home to its former condition versus what the insurance estimate would cover. It referred to adjustments to the insurance estimate as “adjustments/addendum items.”¹² These items do not reference changes to the *Respondent’s* original estimate; rather, they refer to changes the Respondent thought necessary in the *insurance company’s* estimate. These were not “change orders” or any proposed changes to the contract between the Respondent and the Egginks; they were proposals made by the Respondent to bring the insurance company’s numbers closer to those recommended by the Respondent, which would mean less money out of pocket for the Egginks, because under the contract, the Egginks were responsible for amounts that exceeded their insurance coverage.

12. The Egginks paid the Respondent \$71,000 on September 11, 2005.¹³ This was the last payment the Egginks made to the Respondent.¹⁴

13. The Egginks moved back into the home on or about September 19, 2005.¹⁵

14. The work on the home was substantially completed by the end of September 2003, with a few items remaining on a punch list.¹⁶

15. In September 2003 the Respondent sent a “final billing” to the Egginks and the insurance company. The final billing is the original estimate, minus some work the Egginks had performed themselves, for a total of \$262,755.99. The final billing also includes a printout of the materials portion of the total cost, which the Respondent agreed should be subtracted from the total because the Egginks had purchased the materials themselves. The materials adjustment, which is based on the material numbers included in the Respondent’s original written estimate, amounted to \$33,386.55. After subtracting these material costs, the Respondent calculated the total amount owed as \$229,269.44.¹⁷ The Respondent sent an invoice to the Egginks reflecting the payments they had made thus far and providing a balance due of \$135,169.44 (the difference between the total amount owed and the payments made by the Egginks).¹⁸

16. On December 15, 2003, the Respondents sent the Egginks another bill showing a balance due of \$135,169.44 and asking for a payment on the past due balance.¹⁹

¹¹ Ex. 64.

¹² Ex. 65.

¹³ Ex. 1, page 7.

¹⁴ Testimony of Brian Reitzner.

¹⁵ Ex. 1, page 2.

¹⁶ Ex. 1, page 2.

¹⁷ Ex. 63.

¹⁸ Ex. 1, page 9.

¹⁹ Ex. 1, page 10.

17. On December 24, 2003, the insurance company issued a check in the amount of \$77,149.63 as another payment on the claim for the building. The check was made payable to the Egginks only (their mortgage holder was not a payee).²⁰

18. In total, the insurance company paid the Egginks \$244,664.26 for the claim on the building; \$195,842.73 for its contents; and \$20,187.48 for alternative lodging expenses.²¹

19. On December 31, 2005, the Egginks sent a check to the Respondent in the amount of \$55,937 with the notation "Paid in full."²² The Respondent did not cash the check.

20. On January 1, 2004, the Egginks filed a complaint about the Respondent with the Minnesota Department of Commerce. The complaint alleged difficulties concerning missed deadlines; problems with the quality of the work; a "paperwork shuffle" in the back and forth efforts to increase the amount the insurance company would pay, which delayed the release of the money from the insurance company; and a dispute concerning the calculation of the cost of materials paid by the Egginks. The complaint also alleged that Respondent was not paying subcontractors with the payments made by the Egginks.²³ In the complaint letter, the Egginks agreed that they had made partial payments to the Respondent "based off of the original estimate submitted to and agreed upon by Maverick, Farmers Insurance and us."²⁴ This was the Egginks' first and last contact with the Department.²⁵

21. On January 14, 2004, the Department forwarded the complaint to the Respondent and asked for a written response by January 29, 2004.²⁶

22. On January 30, 2004, the Respondent faxed a written response to the Department explaining the delay due to the cause and origin investigation; describing the dispute regarding material allowances and indicating that although the Egginks had purchased materials that were a substantial upgrade from the condition of the home before the fire, they were only entitled to the materials offset contained in the estimate; and detailing the efforts to schedule a meeting with the Egginks regarding the punch list, all of which were canceled by the Egginks. In addition, the response provided that the Respondent had paid every subcontractor who worked on the job.²⁷

²⁰ Ex. 68.

²¹ Ex. 68.

²² Ex. 3 at page 6.

²³ Ex. 1.

²⁴ Ex. 1 at page 2; *id.* at 3 ("We have sent Maverick payment in the amount owing according to their estimate submitted to us and the insurance company"). Although the complaint letter is somewhat rambling and difficult to understand, nowhere in it did the Egginks complain that the contract had not been reduced to writing or that they were unsure what the price was.

²⁵ Testimony of Chris Williams.

²⁶ Ex. 2.

²⁷ Ex. 3.

23. On February 9, 2005, the Department asked for additional information from the Respondent by February 23, 2004.²⁸

24. On February 16, 2004, the Respondent provided a written response and numerous documents, including the written contract, the various estimates, and lists of subcontractors and suppliers and their lien waivers.²⁹

25. The Respondent brought an action against the Egginks in Ramsey County District Court for the unpaid balance due on the contract. In March 2004, the Respondent and the Egginks reached a mediated settlement agreement, pursuant to which the Egginks agreed to pay the Respondent an additional \$100,000 on or before March 5, 2005.³⁰

26. On June 16, 2004, the Department sent the Egginks a letter providing in relevant part as follows:

Based upon a review of the all of the information obtained [sic] it would appear that Mavco, Inc. dba Maverick Construction (Mavco) failed to reduce their contract and change orders to writing. I found no evidence that Farmers approved Mavco's estimate nor did I find your agreement/consent to any of the changes, which amended the contract total price.³¹

27. Under the contract, Farmers Insurance was not required to approve Mavco's estimate as long as the homeowner approved it. There were no change orders that amended the contract total price. The total price did not change. The final billing contained a lower number because it credited the homeowners for work they did themselves or for materials they supplied.

28. On June 17, 2005, the Department issued a Notice of and Order for Hearing, Order for Prehearing Conference, Order to Show Cause, and Statement of Charges. The Notice and Order for Hearing was served by mail on the Respondent on June 27, 2005.

29. On or about July 11, 2005, the parties jointly requested that the prehearing conference be continued from August 26, 2005, to September 9, 2005.

30. On September 7, 2005, the Egginks filed for Chapter 13 bankruptcy protection in U.S. Bankruptcy Court. They have not made any payments to the Respondent pursuant to the settlement agreement.³²

²⁸ Ex. 4.

²⁹ Exs. 5 & 57.

³⁰ Ex. 71.

³¹ Ex. 69.

³² Ex. 70.

31. The prehearing conference was held as scheduled on September 9, 2005. Brian Reitzner appeared for Mavco at the prehearing conference.

32. The hearing was held as scheduled on December 6, 2005.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Commissioner of Labor and Industry and the Administrative Law Judge have jurisdiction in this matter under Minn. Stat. §§ 45.027, 326.91, and 14.50.

2. The Respondent was given timely and proper notice of the hearing in this matter.

3. The Department has complied with all procedural requirements of law.

4. The Department must prove by a preponderance of the evidence that the alleged violations occurred.³³

5. The Commissioner may take action against the license of a person subject to the duties and responsibilities entrusted to the commissioner if the Commissioner finds that the order is in the public interest and the person has provided false, misleading, or incomplete information to the Commissioner or has refused to allow a reasonable inspection of records or premises.³⁴

6. The Respondent did not fail to provide complete information to the Commissioner.

7. Contracts between a contractor and a customer for the performance of a licensee's services must be reduced to writing and must contain the following: (a) a summary of the work to be performed; (b) a description of materials to be used or a list of standard features included; and (c) the total contract price, or a description of the basis on which the price will be calculated.³⁵

8. The contract between the Respondent and the Egginks contained a summary of the work to be performed, a description of materials to be used, and a total contract price. The Respondent's use of this contract did not violate Minn. R. 2891.0030.

9. An Order imposing discipline against the Respondent's license would not be in the public interest.

³³ Minn. R. pt. 1400.7300, subp. 5.

³⁴ Minn. Stat. § 45.027, subd. 7(1) & (3) (2004).

³⁵ Minn. R. 2891.0030.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That no disciplinary action be taken against the residential contractor's license of Mavco, Inc.

Dated this 5th day of January, 2006.

s/Kathleen D. Sheehy
KATHLEEN D. SHEEHY
Administrative Law Judge

Reported: Tape-Recorded (two tapes);
No Transcript Prepared.

MEMORANDUM

The contract between the Respondent and the Egginks provided that the scope of the work and the total price were to be found in the Respondent's estimate, which could be approved by the homeowners themselves or by the insurance company. The contract specifically contemplates that the total cost may exceed the amount of insurance coverage, and the homeowner, by signing, agreed to pay any difference. The Respondent's estimate in the amount of \$269,000 was provided to the Egginks and their insurance company. Based on this agreement, the Respondent started work on the project. Subsequently, the insurance company produced its own estimate of \$206,000, and there was detailed correspondence between the Respondent and the insurance company as to why this sum was insufficient. Ultimately, the insurance company paid the Egginks somewhere between \$244,000 and \$269,000 for the work Respondents did on their home.³⁶

The Department contended at the conclusion of the hearing that the written estimate could not be a part of the contract with the Egginks because it was completed the day after the contract was signed. The Department has provided no legal authority for the proposition that a contract signed one day could not validly reference an estimate dated the next day. What matters is what the parties intended, and it appears from the record that their intention was to include by reference the written estimate in

³⁶ Insurance company records indicate that \$244,000 was paid for damage to the building; however, Mr. Reitzner testified that Karla Eggink acknowledged in a deposition in the district court case that an insurance payment of about \$24,000 made November 28, 2003, for contents of the home, included payment for contents items within the scope of the contract. The contract does include carpet, appliances, window treatments, etc., which the insurance company may have considered to be contents as opposed to building losses. See Ex. 62. Together these payments amount to approximately \$269,000.

the amount of \$269,000 sent to the insurance company on May 15, 2005. In any event, the estimate was provided within the timeframe for rescission of the agreement, and if the estimate had turned out to be higher than the Egginks expected when they signed the agreement on May 14, 2005, they had the option to rescind, which they did not do.

The dispute between the Respondent and the Egginks had to do with implementing their agreement that the Egginks could purchase the materials used in the project, rather than having the Respondent purchase the materials. The Respondent maintained the Egginks were entitled to deduct from the contract price the amount of materials reflected in the written estimate, which Respondent calculated to be approximately \$33,000; the Egginks apparently maintained that they were entitled to deduct whatever they spent on materials, which was a much larger number. The Respondent was not trying to hold the Egginks to any agreement that was not reduced to writing; rather, it appears that the Egginks were attempting to vary the terms of the written estimate by offsetting more in materials costs than was contained in the estimate. The Department has not established a violation of the rule requiring the contract to be in writing and to contain a total price.

With regard to the allegation that the Respondent failed to fully respond to its investigation, the Department's witness testified that this allegation was based on the Respondent's failure to provide a written contract with a specific total amount or any written change orders. As noted above, the written contract references the estimate provided by the Respondent, which has a total amount. There is no evidence that there were any change orders, verbal or otherwise, by which this amount was amended. The only "adjustments" or "addendums" that were referred to in the record were to the insurance company's estimate, not the Respondent's. The final billing gives credit to the homeowner for some work they did themselves and for the materials they paid for directly. This is not a change in the scope or price of the contract, it is a credit appropriately given for work and materials *included within the original agreement*, because the Respondent did not perform the work or pay for the materials. The Department also maintained the Respondent failed to provide specific dates upon which work on the Eggink home started and stopped. The Respondent provided to the Department computerized summaries of bills that were paid for work performed on various dates, from which the approximate dates can be determined. The Department has failed to show that there is some other more specific source of this information that the Respondent had access to but failed to provide. The Department has failed to show that the Respondent provided incomplete information in response to the Department's investigation.

K.D.S.